Mushroom Transportation Co., Inc. ***and*** **Charles Keeler.** *Case No. 4-CA-2627. June 14, 1963*

DECISION AND ORDER

On March 25, 1963, Trial Examiner Samuel M. Singer issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. Thereafter, the Respondent filed exceptions to the Intermediate Report and supporting brief, and the General Counsel filed a brief in support of a portion of the Intermediate Report and exceptions as to a portion thereof.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Rodgers and Fanning].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report and the entire record in the case, including the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

The Board adopts the Recommended Order of the Trial Examiner.[1]

[1] The notice is hereby amended by substituting the following note immediately below the signature line at the bottom of the notice:

NOTE.—We will notify the above-named employee if presently serving in the Armed Forces of the United States of his right to be placed upon the extra list for future employment in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon a charge filed May 14, 1962, by Charles Keeler, an individual, the General Counsel on October 30, 1962, issued a complaint alleging that Respondent, in violation of Section 8(a)(1) and (3) of the Act, discharged and refused to recall or reinstate Keeler because he had engaged in union activities or other concerted activities protected by the Act. Respondent, in its answer, denied the commission of the alleged unfair labor practice.

Pursuant to notice, a hearing was held before Trial Examiner Samuel M. Singer in Philadelphia, Pennsylvania, on December 19 and 20, 1962, and January 7 and 8, 1963. All parties appeared and were afforded full opportunity to be heard and to examine and cross-examine witnesses. The General Counsel and the Respondent have filed briefs which have been carefully considered.

Upon the entire record and my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, a Pennsylvania corporation, is engaged in the business of providing and performing common motor carrier services under the regulations of the Interstate Commerce Commission. It maintains its principal office in Philadelphia, Pennsylvania, and other offices, terminals, and facilities elsewhere in that State and in other States including New York, New Jersey, Delaware, and Maryland. Respondent's terminal located at G Street and Hunting Park Avenue, Philadelphia, is the only terminal involved in this proceeding. During the past year, Respondent, in the course and conduct of its operations at terminals located in Pennsylvania, performed services for customers valued in excess of $100,000, of which, services valued in excess of $50,000 were performed in States other than the State of Pennsylvania.

Respondent admits, and I find, that at all times material herein, Respondent has been, and is, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Highway Truck Drivers and Helpers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent (herein called the Union or Local 107), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background; the employment of Charles Keeler*

Respondent is a member of an employer association, known as Motor Transport Labor Relations Inc. (hereafter called MTLR), and it is, by reason of such membership, bound by a collective-bargaining agreement between MTLR and the Union. Respondent employs between 40 and 45 over-the-road drivers at its Philadelphia terminal. Some of these drivers are part-time drivers or "extras" who are normally hired when regular men are away due to leaves of absence, vacation, illness, or other reasons. H. N. Dougherty, the dispatcher at the terminal, hires the extras from a list supplied to him by the Union's steward, Milton Goessel, who is also a road driver for Respondent.[1] The extras are listed as such on the Company's payroll.

Charles Keeler, the Charging Party, has been an over-the-road driver for 15 years. Prior to July 1961, he worked for a trucking company, known as Royal where he also was the job steward. Keeler lost his job when Royal merged with another company, Helms.

In July 1961 Respondent was in need of drivers because some of its drivers were on vacation or ill. Keeler at that time met Goessel, the Union's shop steward, and he asked for work. Goessel agreed to submit his name to the Company's dispatcher.

Keeler commenced working for Mushroom on July 12. He made, altogether, 51 trips for the Company to four different towns prior to his last trip on December 15, 1961. He made 3 trips in July, none in August, 15 trips each in September and October, 14 in November, and 4 trips on December 1, 2, 5, and 15 respectively. His competence as a driver is not in question.

B. *The processing of Keeler's grievance*

On Thanksgiving Day, November 23, 1961, Keeler returned from a trip and asked Goessel, the union steward, whether he should claim holiday pay by making an appropriate notation on his timecard. Under the collective-bargaining agreement in effect between Respondent and the Union only "seniority" or regular drivers, as opposed to part-time drivers or "extras," were entitled to holiday pay. Goessel advised Keeler not to mark his card for holiday pay, stating that he did not believe that Keeler was acting wisely in making the claim. Keeler contended that he was entitled to the holiday pay under the contract and Goessel agreed to discuss the matter with the Company. Keeler did not mark his timecard.

[1] The record shows, and I find, that Dougherty is a supervisor within the meaning of Section 2(11) of the Act. The parties stipulated that he has "authority to employ extra drivers, using his own independent judgment." He issues directions and instructions to drivers, has authority to reprimand them if they are not satisfactorily performing their jobs, and approves the drivers' timecards before payment of wages. Dougherty is regarded by the drivers as part of management.

Goessel first took up the matter of Keeler's entitlement to holiday pay with Dougherty, the Company's dispatcher whose responsibilities included the approval of the timecards prior to payment. At Keeler's urging, Goessel then discussed the matter with Richard W. Cutaiar, the Company's president, who is also in charge of its labor relations. Keeler insisted on accompanying Goessel to Cutaiar's office, some distance from the terminal, and to help present his claim but Goessel did not want him along because he had other business to transact with Cutaiar. Thereupon Keeler followed Goessel to Cutaiar's office in his own car but remained outside the office.

Cutaiar denied Keeler's claim for holiday pay. Keeler testified that when Goessel left Cutaiar's office he "seemed upset" and he "berated Keeler by saying "You're a hot potato. You've got me over a barrel." Keeler replied that he "can't understand this, I'm just processing a grievance." [2] When Keeler asked Goessel about the outcome of his claim, the latter replied "We'll have to wait and see."

In January 1962 Keeler took up his claim with Business Agents Baker and O'Lear, Goessel's superiors. On April 30, Baker, in accordance with the terms of the bargaining agreement in effect, filed a grievance on behalf of Keeler with MTLR.[3] In the interim Baker also discussed Keeler's claim with Cutaiar. A "hearing" was thereafter held before J. H. Matthews the secretary of MTLR on May 7 [4] at which the Company was represented by Cutaiar and the Union by Business Agents Baker and Finnegan, Steward Goessel, and Keeler. Baker, the Union's chief spokesman, took the position that under the collective-bargaining agreement, Keeler was a regular or "seniority" employee and as such entitled to the contract benefits, including holiday pay for Thanksgiving, as he had worked more than 33 days during a 90-day period prior to Thanksgiving.[5] Cutaiar took the position that Keeler was hired as a part-time or extra employee, that his status never changed, and that he therefore never acquired the contract benefits applicable to regular or "seniority" employees. Goessel agreed with Cutaiar that Keeler was engaged as an extra, stating that he supplied his name to the dispatcher along with the names of others who sought part-time employment. Goessel also agreed that Keeler's status was never changed. Matthews then rendered his decision, sustaining the Company's claim and Baker served notice that he was going to process the grievance through the next step.

Both Baker and Keeler were present at the next stage in the processing of the grievance which took place on May 29, 1962. Baker testified at the instant hearing that he now became convinced that Keeler was in fact an extra and not a regular employee but when the grievance was determined adversely to Keeler, the Union decided to take the matter up further (to the fifth step in the grievance procedure) in order to give Keeler the full measure of the grievance procedure.

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[2] Goessel denied that he had called Keeler a "hot potato" but did not specifically deny the balance of the conversation with Keeler I credit Keeler's testimony in this instance. As hereafter noted, Keeler during the period of his employment had discussed with fellow drivers the laxity in the enforecement of the Union's bargaining agreement with the Company It is apparent from the record that Goessel had resented what he considered to be Keeler's intrusion in his own domain as steward

[3] The governing bargaining agreement sets up an elaborate procedure for processing grievances, commencing with the initial handling of the grievance by the union steward and a company representative through various other stages—including one calling for attempted adjustment before the secretary of MTLR—ultimately terminating in arbitration.

[4] Matthews who testified before me characterized the MTLR proceedings as "hearings." These were in effect no more than conferences or meetings in which all interested parties presented and processed their positions Under the applicable procedure, the secretary's decision on the merits of the grievance was binding on the employer but not on the Union. If the Union was dissatisfied, it could invoke the next step in the grievance procedure which is a proceeding before a joint committee, composed of representatives of the Union and MTLR. The fifth step—the last one here resorted to which is referred to *infra*—is a proceeding before an MTLR officer and the secretary-treasurer of the Union

[5] Article V, section 2 of the contract provides: "After an employee has worked for an Operator at least thirty-three (33) days during any ninety (90) consecutive calendar days, an employee shall gain seniority status and his seniority date on the seniority list shall revert to the first day of his ninety (90) day qualification period. No Operator shall be permitted to deprive a qualified employee of the right to gain seniority status by any subterfuge or by any refusal to hire such qualified employee when work is available Any employee hired as a seasonal, casual, or part-time worker shall not become a seniority employee under these provisions where it has been agreed by Operator and steward that he was hired for seasonal, casual, or part-time work . . . ."

On October 23, 1962, Raymond Cohen, secretary-treasurer of the Union met with the president of MTLR to further discuss Keeler's grievance.[6] Cohen now accepted the Company's position that Keeler was hired and employed as an extra driver and, therefore, that he was not entitled to the holiday pay that he had claimed. No further steps were taken to process the grievance.

C *Keeler's activities leading to the Company's refusal to assign him further work*

1. Company President Cutaiar's stated reasons for denying additional work to Keeler

As already noted, the last trip assigned to Keeler was on December 15, 1961. Keeler received no additional work at Respondent thereafter although he requested work.[7] Company President Cutaiar testified that he had directed the removal of Keeler's name from the extra list because: (1) He had heard rumors from drivers—naming Ramaito and Fausey as two such drivers—that Keeler was going to report the Company for ICC violations, identifying as one such violation the Company's alleged failure to accord the drivers 8 hours off between trips;[8] and (2) during the latter part of Keeler's employment, he heard other rumors to the effect that Keeler was telling the drivers that "they were not getting what they were entitled to" under the existing bargaining contract with the Union. Cutaiar specifically referred to Keeler's discussions with employees concerning holiday pay benefits and the claim that the drivers of another company, Norwalk, were making trips that Respondent's own men should be making.[9] When asked whether he did not in fact first investigate Keeler after he made his last trip on December 15, Cutaiar replied that he did not as he had heard enough rumors before that. Cutaiar testified "I heard enough. I felt that this man I owe nothing to. He's on our register list. If he's going to become a troublemaker, telling drivers lies about what they are entitled to and not entitled to, why do I have to keep him? Take him off the list." [10]

At the grievance "hearing" held on May 7, 1962 (*supra*), Cutaiar had advanced similar reasons for the Company's denial of further employment to Keeler. Cutaiar there stated that Keeler had "talked with some of the other people and got them upset. He had done other things to cause trouble for us . . . ." Cutaiar referred to a complaint previously filed by another driver with ICC which brought about an extensive investigation and he stated that he "didn't want anymore trouble." [11]

On May 29, 1962, Cutaiar signed a statement which was prepared by the Company for use in presenting the Company's position at the May 29 grievance meet-

[6] Neither Baker nor Keeler were present at this meeting

[7] Keeler testified that Dougherty, the dispatcher, declined to send him out on loads after the first week of December, presumably after December 5, until which time he worked for Respondent at regular intervals According to Keeler he managed to get a final day's work on December 15 through the intercession of one of the Union's business agents Keeler actually worked December 12 and 13 (and also subsequent to December 15) for other companies, having been referred to these jobs by the Union

[8] It is apparent from the foregoing and other evidence in the record that Keeler had discussed the matter of the Company's alleged ICC regulation violations with other drivers

[9] These drivers apparently worked for other companies during the week and were hired by the Company as extras during weekends.

[10] Cutaiar flatly characterized Keeler's remarks about the employees' entitlement to benefits as "untrue." He was not so definitive about the possible ICC regulation violations as to which he stated: "I can't say definitely about the ICC I don't think there are any violations I didn't investigate . . . " Keeler denied that he had in fact made any complaints to the ICC and Cutaiar admitted that no complaints were actually lodged

[11] The "minutes" of the May 7 "hearing" (General Counsel's Exhibit No 3) were admitted in the record over the objection of Respondent Matthews, secretary of MTLR, testified that minutes, like the ones here involved, are taken in "every case"; that they were prepared by his assistant who was present, that, in accordance with usual practice, they were taken in longhand but not verbatim, and that copies were sent to all parties, including Respondent and the Union, "so every one will have a record of what took place." Cutaiar, after examining the minutes at the instant hearing, testified that they were "substantially correct" except as to one item not here involved Baker, the Union's chief spokesman, testified to the same effect I now reaffirm my ruling that the document is admissible as trustworthy and as reflecting the susbtance of what transpired at the May 7 meeting. Moreover, I note that Cutaiar in his testimony affirmed the correctness of the position taken by him at the May 7 meeting as herein summarized, and that this position, moreover, accords with that taken by Cutaiar in a statement submitted by Respondent in connection with the next grievance meeting held May 29 as hereafter detailed.

ing. Cutaiar in this statement gave the following "examples" of Keeler's activities which, he said, indicated that Keeler "had been interferring with our steward's job, telling some of our regular employees that they were not being treated fairly by the Company:" [12] (1) Keeler told one employee, John Persing, that "he should be getting some of the extra trips instead of the company using extra men"; (2) Keeler "advised" Henry Ramaito of his "seniority rights, hourly pay, etc."; (3) he told Fausey, another regular driver, "when I get my foot into the door at Mushroom, there will be some changes made"; (4) he told Evans, an extra driver, that he (Keller) "would never want to work steady for Mushroom"; and (5) he told Comerford, another extra driver, that "he was going to make Mushroom Transportation Company put a sidewalk along Hunting Park Avenue." [13] Cutaiar indicated that he had investigated Keeler and discovered that "he had a reputation for being a troublemaker" even before he began working for the Company, and feeling that Keeler was only an extra and that the Company had "no obligation whatever to Charles Keeler," he directed Keeler's summary removal from the extra list.[14]

2. Keeler's and other employees' testimony concerning Keeler's activities

Keeler testified in detail as to his discussions with his fellow employees concerning their entitlement to benefits. He stated that some of the employees knew that he had been the Union's steward on his prior job and the men would frequently request his "opinion of different things that were taking place at Mushroom," as they met and talked at various diners and coffeeshops near the terminals and along the highways. Thus, Keeler testified that he discussed with Ramaito, a regular employee, Ramaito's complaint that it took him a long time to acquire his status as a regular driver and with it the benefits that go with status under the bargaining contract, such as holiday pay and vacations.[15] Keeler further testified that he discussed with Persing the Company's practice of giving extra work to drivers of other companies (such as Norwalk and Davison) instead of using its own men. He testified that this was also the subject of discussion with another employee, Walker, who complained about the Norwalk men "bumping in on us." Keeler also testified that another driver, Reed, had complained that the Company had him come in from Kennett Square (where he allegedly resided) to pick up his truck at Philadelphia while the Company at the same time sent another driver from Philadelphia to Kennett Square to pick up a load there.

Ramaito, called as a witness for Respondent, denied that he had made any complaints to Keeler, claiming that it was Keeler who had complained about not getting paid enough for certain work. Walker and Reed, also called by Respondent, denied that the conversations related by Keeler ever took place; Reed explained that he did not live in Kennett Square but in Wayne, 24 miles away. Respondent did not call Persing as a witness Fausey, a driver not specifically mentioned by Keeler but called by Respondent, testified that Keeler told the drivers that they "were not getting paid enough" for their work. According to Fausey, Keeler told him on one occasion "I just wanted to get my foot in the door and there are going to be changes made in Mushroom." [16] Allen Foster, another company witness, did not testify as to any specific complaints discussed with Keeler [17] but stated that he did not know anyone that "had a good word" for Keeler and that the drivers felt that "the man was out to make trouble of some sort."

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[12] At the hearing Cutaiar testified that in his statement he listed only a few examples, stating that Keeler's activities "were too numerous" to enumerate in the document.

[13] Keeler testified that he was an elected "committeeman in the neighborhood" where he resides and also where Respondent's terminal is situated; and that in this capacity he lodged, at the instance of his constituents, a complaint with the municipal authorities, alleging the need for a sidewalk adjoinisg the terminal where a bus stop is located. According to Cutaiar, Respondent thereafter constructed such sidewalk at a cost of $6,000.

[14] Cutaiar's statement of May 29, 1962 (General Counsel's Exhibit No. 6) was admitted into the record without objection, the parties stipulating that the document had been submitted by Cutaiar to MTLR on behalf of Respondent at the May 9, 1962, grievance meeting

[15] Ramaito was the last man on the regular or seniority roster.

[16] Keeler could not "recall" making the last-mentioned remark but admitted talking to Fausey

[17] Foster testified that Keeler called him on another matter, namely to request information about extras employed by the Company, presumably after Keeler's separation, in order to establish that "he was being discriminated against." Foster stated that he himself had complained to the union steward about more extra trips.

The foregoing summary of employee testimony—whether I accept Keeler's version of the conversations or that of Respondent's witnesses—reveals that in all cases, in which conversations admittedly took place, the subject of discussion concerned wages and conditions of employment and legitimate employee interests. Company President Cutaiar's own statements and testimony confirm that these were the matters that engaged the employees' attention. He specifically named Persing, Ramaito, and Fausey, among those with whom Keeler had discussed employee matters. In his testimony at the hearing Cutaiar alleged that there were others "too numerous" to mention. In view of Cutaiar's admissions and the uncontradicted evidence regarding the subjects of discussion between Keeler and employees other than Walker and Reed, I do not deem it necessary to specifically resolve the conflicts in the testimony of Keeler and Walker and Reed.[18]

Discussion and Conclusions

The uncontradicted evidence shows that Charles Keeler commenced working for Respondent as a truckdriver on July 12, 1961, and that he last worked for the Company on December 15, 1961. Respondent concedes that it had denied further employment to Keeler thereafter. It does not question Keeler's ability to perform or the availability of work for Keeler. The General Counsel contends that Keeler was terminated because (1) he processed a grievance to establish his entitlement to holiday pay as a "regular" employee; and (2) he engaged in other protected concerted activities consisting of discussions of complaints and grievances with fellow employees. The General Counsel requests that the remedial order direct Respondent, among other things, to reinstate Keeler to his former position as a regular employee. Respondent takes the position (1) that Keeler was engaged as an "extra" or part-time employee and remained in this status until it removed his name from the list of extras in December; and (2) that Keeler's name was not removed from the list either because he processed his grievance or because he engaged in other protected concerted activities. Respondent claims that Keeler by his activities sought to advance only his own personal interests and that he was nothing but a "troublemaker." In the discussion below, I shall first consider Keeler's status as a regular or extra driver and, then, whether Respondent's denial of further employment to Keeler was occasioned by his processing his grievance or by his resort to other protected concerted activities.

a. *The status of Keeler's employment*

For the reasons stated below, I find, as Respondent contends, that Keeler was hired as a part-time or extra employee and that he had worked for the Company in that capacity until his separation on December 15, 1961.

It is clear from the record that Keeler was initially put on the Company's payroll and hired as an "extra," although it is not clear whether Keeler was specifically told so *in haec verbae*.[19] The uncontradicted evidence shows that the Company maintains a list of extras from which it selects individuals to fill in for regular drivers who are

[18] If I were required to resolve the conflict, I would be inclined to accept Keeler's version because it is more inherently probable, although I do have grave doubt that Keeler's description of the incident with Reed took place as Keeler described it in view of the fact that Reed did not reside at Kennett Square (Keeler explained that in his talk with Reed, he gained "the impression he did live in Kennett Square" because Reed had stated "he lives out of Philadelphia and out north and west.") Moreover, I have no doubt, as Respondent's witnesses testified, that in most cases in which Keeler discussed grievances it was Keeler who initiated the discussions. Furthermore, it is apparent that Keeler, who impressed me as a zealous partisan, at times colored his testimony in a way which he thought would best serve his interests as when he added in almost every recitation of the events that he had suggested to each employee that he should process his grievance or complaint "through normal channels." At the same time I got the definite impression that Respondent's witnesses, who were still in the Company's employ, strived to suppress any display of dissatisfaction with working conditions for fear that they might hurt their standing with the Company and even with their own union steward.

[19] Keeler at one point flatly denied that he was told he was being hired as an extra but at another point he stated that he was not "particularly told" and, still at another point, that he "thought after I had required time in I would" become a regular driver. Similarly Goessel, the Union's steward, testified at one point that he never specifically told Keeler that he was being referred as an extra but at another point he stated that he was.

ill, or are on vacation, or are otherwise unavailable. Some of Respondent's drivers were on vacation in July and others continued in that status even as late as October. There were in July and for months thereafter employees on extended sick leave.[20] Although by no means determinative of the question, the record also shows that Keller never in fact filed with Respondent a formal application for employment. On the other hand, he had filed applications—as he reluctantly admitted—with two companies between July and December, one of them (with Continental Transportation) as late as November 20, 1961. In the interim Keeler worked for other companies in July, August, and September. In any event, Keeler was carried on the Company's payroll as an extra, along with other extras. And like other extras, he was usually paid after each trip out of the terminal itself, rather than on a weekly basis and out of the Company's general offices as were the regular drivers.

In view of the foregoing and the other evidence in the record, I do not credit Keeler's testimony which purports to show that on September 9, 1961, Dougherty (the Company's dispatcher) had requested him to choose, and he did choose, between regular work at Mushroom and temporary work elsewhere. Dougherty, whom I find to be a credible witness, testified that no such conversation occurred. The conversation, if it did occur, would in itself tend to establish that Keeler well understood that he was, at least prior to September 9 (including the date of hiring), only an extra employee.

Accordingly, I find that Keeler was initially engaged as an extra or part-time employee and that he retained this status until December 15, 1961, when he was denied further employment.[21]

b. *Respondent's denial of further employment to Keeler*

Having found that Keeler was an extra or part-time employee, the question still remains whether Respondent's removal of his name from the list of extras was, as the General Counsel contends, prompted by unlawful motives. It is apparent that Company President Cutaiar was under the impression that as long as Keeler was only an extra the Company had "no obligation whatever to Charles Keeler" and it could remove him peremptorily. While this position may well have been correct insofar as Cutaiar's contractual obligations were concerned, it is not so insofar as his obligation under the statute is involved. It needs no citation of authority to demonstrate that Keeler, although an extra, was an employee under the statute and any discrimination against him for engaging in protected concerted activities, was a violation of the Act.

1. The alleged refusal to offer Keeler additional work because of the processing of his grievance

The processing of a grievance is, of course, a protected concerted activity, and any discrimination against an employee for engaging in such activity is violative of the Act. See *Bowman Transportation, Inc.*, 134 NLRB 1419, enfd. in this respect 314 F. 2d 497 (C.A. 5). However on the entire record I can find no substantial support for the General Counsel's claim that Respondent had discharged Keeler for this activity.

As already noted, the collective-bargaining contract in effect between Respondent and the Union sets up an elaborate machinery for processing grievances, commencing with initial handling of the complaint by the Union's steward and a company representative through various stages ultimately leading to arbitration. Insofar as it appears, utilization of the grievance procedure under the contract was a common and normal practice. There is no evidence of any company hostility or resentment toward

[20] Under the contract between Respondent and the Union a sick employee accumulates seniority and apparently is not subject to replacement for as long as 2 years.

[21] The governing collective-bargaining contract specifically provides that an employee shall not become a regular or senior employee "where it has been agreed by Operator and steward that he was hired for . . . part-time work." Unless a further agreement is made, the employee so hired apparently remains a part-time employee. I construe the contract provision regarding acquisition of seniority status after working 33 days during any 90-day consecutive period (*supra*, footnote 5) as applicable to those initially hired as regular and not part-time employees. In any event, this appears to be the basis upon which the Union ultimately yielded to the Company's position in the grievance proceedings, namely, that Keeler never acquired seniority or regular status. Under these circumstances it matters not that Keeler made as many as 51 trips in the 5-month period of his employment or that he may have had high earnings during this period.

the exercise of this right. On the contrary, the Union, which has processed grievances on behalf of Respondent's employees, appears to have had amicable relations with Respondent. The very grievance here involved (Keeler's claim for holiday pay) demonstrates full company cooperation in bringing it to resolution through various stages. There is some evidence in this record that Goessel, the Union's steward, may have resented some of Keeler's activities (i.e., his discussions of employee complaints) which he felt was not Keeler's concern. But the record demonstrates that even Goessel played his proper role in pressing the grievance with management despite his personal view that it had little or no merit. In any event, I can hardly attribute the union steward's attitude nad resentment to the Company.[22] The Union's business agents and officials thereafter continued to press the grievance with vigor through further stages until they became convinced of the validity of the Company's position. Keeler in this hearing expressed complete satisfaction with the manner in which the Union's agents handled his grievance and his relations with the Union have remained amicable. The record shows that the Union has been instrumental in obtaining other employment for Keeler since December and Keeler is presently working in what appears to be steady employment.

Accordingly, I conclude that the General Counsel failed to show that Respondent's decision to remove Keeler from the extra list, and thereby denying Keeler further employment after December 15, 1961, was motivated by Keeler's processing of his grievance.

2. Respondent's refusal to afford Keeler additional work because he engaged in other protected concerted activities

While, as I found above, Respondent was fully tolerant of Keeler's activity in processing his grievance, the record establishes, and I find, that it definitely resented Keeler's other activities which, I find, were protected concerted activities for mutual aid and protection. I further find that it was this resentment which motivated Company President Cutaiar to direct his dispatcher to remove Keeler's name from the extra list—an action which deprived Keeler of further employment with Respondent.

Cutaiar's own statements and testimony demonstrate Respondent's motivation. Cutaiar, as he testified, considered Keeler a "troublemaker" because he was telling the drivers that "they were not getting what they were entitled to" under the collective-bargaining agreement and because, according to rumors he heard from drivers, Keeler was going to report the Company to the ICC for alleged violations, including such violations as the Company's alleged failure to accord the drivers adequate time off between trips. The matters as to which Keeler was arousing the drivers, according to Cutaiar, were holiday pay, vacations, and the Company's practice of assigning extra trips to drivers of other companies rather than to its own regular drivers. It is plain that Keeler's activities were directly related to the employees' legitimate interests in terms and conditions of employment. These activities also involved attempts by Keeler to implement the existing collective-bargaining contract in a manner in which he felt it to be applicable to himself and to other drivers. Keeler's activities therefore fall within the protected ambit of concerted activities as defined in Section 7 of the Act. *Merlyn Bunney, et al., d/b/a Bunney Bros. Construction Co.*, 139 NLRB 1516. See also, *Salt River Valley Water Users Association* v. *N.L.R.B.*, 206 F. 2d 325, 328–329 (C.A. 9) and cases cited therein.[23] The fact that there might

[22] I reject the General Counsel's contention in his brief that "Respondent, by giving Steward Goessel hiring authority, made him its agent" There is no substantial evidence that the Company had clothed Goessel with hiring authority. Goessel did from time to time give the names of extras to Dougherty, the company dispatcher, but it was Dougherty, and not Goessel, that picked and hired the extras.

[23] As noted, *supra*, Cutaiar in his May 29, 1962, statement also referred to the fact that Keeler had forced Respondent to install a sidewalk in front of its place of business I find that this activity of Keeler which he undertook to perform in his capacity as "committeeman in the neighborhood," a political office, was not, as Respondent suggests motivated by "maliciousness" and, moreover, it was not a significant factor in Respondent's decision to separate Keeler Cutaiar in his testimony at the instant hearing did not even refer to this incident. In any event, "In order to supply a basis for inferring discrimination, it is necessary to show that one reason for the discharge is that the employee was engaging in protected concerted activity It need not be the only reason but it is sufficient if it is a substantial reason or motivating reason, despite the fact that other reasons may exist" *N L R B.* v. *Whitin Machine Works*, 204 F. 2d 883, 885 (C.A 1).

have been no merit to the complaints raised by Keeler is, in itself, of no material consequence. For, the right of employees to press complaints does not depend on either the employer's or the Board's appraisal of the merit of the employees' complaint. The "wisdom or unwisdom of the men, their justification or lack of it" (*N.L.R.B.* v. *Mackay Radio and Telegraph Co.*, 304 U.S. 333, 334), is irrelevant to the question of whether employees are engaging in protected concerted activity. *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9, 16; *Cusano d/b/a American Shuffleboard Co.* v. *N.L.R.B.*, 190 F. 2d 898, 902 (C.A. 3). And it does not appear that the complaints raised by Keeler—whether they be his own or those of others whom he urged to seek redress—were raised in bad faith, with knowledge that they were groundless or with an intent to harass the employer. Cf. *Northern Motor Carriers, Inc.*, 130 NLRB 261, 262.

I have no doubt, as Cutaiar repeatedly emphasized in seeking to justify Keeler's separation, that Keeler's activities may well have engendered some unrest and "trouble" among employees who may have felt satisfied with their working conditions. However, "It is obvious that concerted activities which are protected by the Act often create a disturbance in the sense that they create dissatisfaction with the status quo. Such a fact without more can hardly justify discharge." *Salt River Valley Water Users' Association* v. *N.L.R.B.*, 206 F. 2d 325, 329 (C.A. 9). A strike, for example, is a typical activity which may bring dissatisfaction among employees and "trouble" to an employer. But it can hardly be suggested that the strike falls outside the protection of the Act merely because of such consequences. Hence, the fact that Keeler may have been a thorn in Respondent's side because of his activities is not a critical factor.

Nor can I accept Respondent's contentions that Keeler's activities were not "concerted" because they involved discussions with employees one at a time; and that these activities were not for "mutual aid or protection" because Keeler's activities were in furtherance of his own personal interest to enhance his ambition to become the terminal steward. As to the first contention, the Board has already ruled that "an activity may be concerted although it involves only a speaker and a listener." *Salt River Valley Water Users' Assn.*, 99 NLRB 849, 853, enfd. 206 F. 2d 325, 328 (C A. 9). See also, *Root-Carlin, Inc.*, 92 NLRB 1313, 1314. Such activity is concerted because it involves more than one employee. In addition, it is an indispensable step to induce other employees to make common cause for the correction of the grievance of a fellow employee and to obtain improved working conditions generally. Any other result would operate to thwart concerted activity "only a little beyond the embryonic stage" and "make certain that the seed would never germinate." *N.L.R.B.* v. *Sam Wallick and Sam K. Schwalm d/b/a Wallick and Schwalm*, 198 F. 2d 477, 482 (C.A. 3). Surely, the "broad" protection afforded employees to engage in concerted activities does not "compel the Board to interpret and apply . . . [the statute] in the niggardly fashion suggested by the respondent" (*N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9, 14).

As to Respondent's contention that Keeler's prime motivation in pursuing his activities was to establish himself as the steward at the Company and thereby assure for himself regular and steady employment at the terminal,[24] I find that the factual record does not support this claim. Apart from the testimony of one employee who quoted Keeler as stating that he "wanted to get [his] foot in the door and there are going to be changes" at the Company—a statement equivocal at best—I find nothing in the record that even intimates that Keeler's activities were moved by pure ambition for "political" advancement in the union hierarchy. The fact that Keeler considered himself a regular employee would seem to militate against the conclusion that he sought to be a steward to secure "regular" status. In my view, a finding that Keeler resorted to the concerted activities for the purpose of enhancing his own personal objective for union office would rest upon suspicion and conjecture. In any event, even if I were to find that such was Keeler's motivation, I do not believe that the concerted activities would necessarily fall outside the protection of the Act, if the activities involved the promotion and advancement of employee interests affecting wages, hours, and terms and conditions of employment. See *Joanna Cotton Mills Co.* v. *N.L.R B.*, 176 F. 2d 749, 753 (C.A. 4). The law does not require that activities, otherwise sheltered, spring from exalted motives. Thus, it is immaterial, for example, that the key unionist in a plant is driven to organize employees by hoped-for

[24] The collective-bargaining contract in effect between Respondent and the Union accords top seniority rights to stewards in case of layoff.

prestige and assumption of union leadership rather than by a desire for improved working conditions.[25]

Finally, I must reject Respondent's contention that "an important element necessary" to prove a violation on the part of Respondent is union animus which, as Respondent points out, is here lacking. Since my finding of discrimination herein is predicated not on any conventional union activity by Keeler but, rather, by his participation in other concerted activity for mutual aid or protection, it is immaterial that Respondent has not entertained any union animus in directing Keeler's removal from the extra list. No "union purpose of relationship" need be present. *N.L.R.B.* v. *J. I. Case Co.*, 198 F. 2d 919, 922 (C.A. 8). Cf. *N.L.R.B.* v. *Nu-Car Carriers*, 189 F. 2d 756, 760 (C.A. 3), cert. denied, 342 U.S. 919.

For all of the foregoing reasons I conclude that Respondent, by removing Keeler's name from the extra employees list (and thereby depriving Keeler of further employment with Respondent as a part-time employee) because Keeler engaged in protected concerted activities, interfered with, restrained, and coerced him in the exercise of his right to engage in such activities and, thereby, violated Section 8(a)(1) of the Act.[26]

IV. THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent violated Section 8(a)(1) of the Act in removing Keeler's name from its extra list, and thereby denying Keeler further employment, because Keeler had engaged in protected concerted activities under the Act, I will recommend that Respondent restore his name on its extras list for future employment, in accordance with any nondiscriminatory system of selection Respondent had employed in the past, and without prejudice to any rights and privileges he previously enjoyed; and that Respondent make Keeler whole for any loss of earnings he may have suffered by payment to him of a sum of money equal to that which he would have earned from the date of the removal of his name from the extra list to the date of the restoration of his name on that list, less net earnings during said period. Backpay shall be computed on a quarterly basis and interest shall be added at the rate of 6 percent per annum. See *F. W. Woolworth Co.*, 90 NLRB 289; *Isis Plumbing & Heating Co.*, 138 NLRB 716.

CONCLUSIONS OF LAW

1. By removing Charles Keeler's name from its extra list, and thereby denying further employment to Keeler after December 15, 1961, because he had engaged in protected concerted activities, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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[25] The instant case is therefore distinguishable from cases relied on by Respondent, such as *Joanna Cotton Mills Co.* v. *N.L.R.B.*, 176 F. 2d 749 (C.A. 4). The decision in that case turned solely on the fact that the employee was merely seeking "to vent his spleen" on a supervisor with respect to a matter having no rational connection with wages, hours, or working conditions (176 F. 2d at 753). Here, as I found, Respondent's resentment against Keeler is a direct outgrowth of Keeler's activities regarding Respondent's policies on holiday pay, vacations and other terms and conditions of employment. The Board's holding in *Northern Motor Carriers, Inc.*, 130 NLRB 261, cited by Respondent, is not inconsistent. *N.L.R.B.* v. *Gibbs Corporation*, 284 F. 2d 403 (C.A. 5), also relied on by Respondent, is distinguishable on the ground that there the court found that the employee's action was in no way related to concerted action. The company there discharged an employee, the plant steward, because he was an "habitual nuisance" in pressing "grounds personal to him" and making "repeated requests for special treatment" for himself; he was not discharged for seeking to advance the benefits of fellow employees (284 F. 2d at 405, 406).

[26] In view of the foregoing finding I do not deem it necessary to determine whether Respondent's conduct also constitutes a violation of Section 8(a)(3) of the Act as alleged in the complaint. Cf *Bunney Bros. Construction Company*, 139 NLRB 1516, footnote 5. The remedy to cure the effect of the unfair labor practice (reinstatement and backpay) which I shall recommend would be the same, whether the violation be of Section 8(a)(1) or Section 8(a)(3). See *N.L.R.B.* v. *Kennametal*, 182 F. 2d 817, 818 (C.A. 3). But see, *Gullet Gin Company* v. *N.L.R.B.* 179 F. 2d 499, 501–502 (C.A. 5).

2. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that Respondent, Mushroom Transportation Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees in the exercise of their right to engage in concerted activities for their mutual aid and protection by discriminating in regard to their hire, tenure of employment, or any term or condition of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to engage in, or to refrain from engaging in, any or all the activities specified in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Restore the name of Charles Keeler to its extra list for future employment in accordance with any nondiscriminatory system of selection Respondent had employed in the past, and without prejudice to any rights and privileges he previously enjoyed, and make him whole for any loss of pay he may have suffered, in the manner set forth in the section entitled "The Remedy."

(b) Upon request make available to the Board and its agents, for examination and reproduction, all payroll records and other data necessary to analyze and compute backpay.

(c) Post at its Philadelphia main office and terminal, copies of the attached notice marked "Appendix." [27] Copies of said notice to be furnished by the Regional Director for the Fourth Region shall, after being duly signed by a representative of Respondent, be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Fourth Region, in writing, within 20 days from the date of this Intermediate Report and Recommended Order, what steps the Respondent has taken to comply herewith.[28]

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[27] In the event that this Recommended Order be adopted by the Board, the words "Pursuant to a Decision and Order" shall be substituted for the words, "Pursuant to the Recommended Order of a Trial Examiner" in the notice In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "Pursuant to a Decision and Order "

[28] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights to engage in concerted activities for their mutual aid and protection, by discriminating in regard to their hire, tenure of employment, or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their right to engage in, or refrain from engaging in, any or all the activities specified in Section 7 of the Act.

WE WILL restore the name of Charles Keeler to our extra list for further employment in accordance with any nondiscriminatory system of selection we had employed in the past, and without prejudice to any rights and privileges he

previously enjoyed, and we will make him whole for any loss of pay suffered as a result of the discrimination against him.

MUSHROOM TRANSPORTATION CO., INC.,
Employer.

Dated_____ By_____
(Representative) (Title)

NOTE.—We will notify Charles Keeler, if presently serving in the Armed Forces of the United States, of his right to be restored on our extra list, in accordance with the Selective Service Act after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1700 Bankers Security Building, Walnut and Juniper Streets, Philadelphia, Pennsylvania, 19107, Telephone No. Pennypacker 5-2612, if they have any questions concerning this notice or compliance with its provisions.

West Point Manufacturing Company, Wellington Mill Division *and* Textile Workers Union of America, AFL-CIO. *Case No. 11-CA-2018. June 17, 1963*

DECISION AND ORDER

On March 27, 1963, Trial Examiner Benjamin B. Lipton issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. Thereafter, the Respondent and the Charging Party filed exceptions to the Intermediate Report and the Respondent filed a supporting brief.[1]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Rodgers and Fanning].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in this case, and finds merit in the Respondent's exceptions. The relevant findings of fact made by the Trial Examiner, as indicated below, are hereby adopted, but his conclusions and recommendations are adopted only to the extent consistent with our decision herein.

The complaint alleges, and the answer denies, that Hugh Rodgers, "personnel assistant" of Respondent, is a supervisor and agent of Re-

[1] The Board has treated the Charging Party's letter of April 19, 1963, as exceptions to the Intermediate Report. In view of the fact that the complaint herein is dismissed, we hereby deny the Charging Party's request for an Order broader than that recommended by the Trial Examiner. Its request for oral argument, contained in the April 19 letter, is also denied, as, in our opinion, the record, exceptions, and brief adequately present the positions of the parties.